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Samantha Besson / Lukas Heckendorn Urscheler / Samuel Jubé (eds)

Comparing Comparative Law

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Table of Contents

Preface

The aim of this volume is to compare how we do comparative law. So-doing, it contributes to discussions in the theory of comparative law. It does not proceed in the usual way, however, but adopts a comparative, inclusive and discursive perspective.

More specifically, the volume aims at broaching three questions: (i) what is being compared when comparing law (the *object* of comparison: e.g. what exactly among legal norms, from which legal sources and from which jurisdictions, but also maybe from which other sources of normativity outside the law?), (ii) what comparing (law) means (the *nature* and *aims* of comparison: e.g. is it about understanding, interpreting, distinguishing, systematizing, justifying, criticizing and/or reforming (one's or others') law?); (iii) and how comparing law works (the *process* of comparison; e.g. what are its methods, actors and outcomes?). Of course, the three questions are interrelated and are only separated for the sake of clarity in the discussion.

The chapters in this volume were all presented at a conference held at the University of Fribourg on 23rd October, 2015. The conference was jointly organized by the University of Fribourg, the Swiss Institute of Comparative Law (ISDC) and the Institute for Advanced Study (IEA) of Nantes.

The speakers invited to the conference came from both the practice (and in particular comparative law institutions and libraries or courts) and the scholarship of comparative law, some in specialized areas of law and others in the law more broadly. Importantly for the inclusive nature of our endeavour, participants came from all around the world. Putting together such a group of experts was only possible thanks to the combination of the strengths of the three institutions involved and their network worldwide. Among those who participate in the debates but did not contribute to the volume in the end, one should mention Augustin Emane, Marie-Claire Foblets, Sitharamam Kakarala, Otto Pfersmann and Corine Widmer Lüchinger.

Organizing the conference at the origin of this volume would not have been possible without the help of Ms Lorna Loup (University of Fribourg), Ms Marie Papeil Sánchez (ISDC) and Ms Aurélie Galetto (University of Fribourg). We are also grateful to the Swiss State Secretariat for Education, Research and Innovation (SEFRI) for its financial support in the context of the scientific partnership between the University of Fribourg and the IEA.

Last but not least, we would like to thank Mr Seth Médiateur Tuyisabe and Ms Marie Papeil Sánchez (ISDC) for their precious help with the formatting and editing of the manuscript.

Fribourg / Lausanne / Nantes, 13th November 2016

Samantha Besson
University of Fribourg

Lukas Heckendorn Urscheler
ISDC

Samuel Jubé
IEA

Samantha Besson / Lukas Heckendorn Urscheler / Samuel Jubé

Introduction

1. The contributions in this volume explore usual topics in comparative law theory such as the nature, methods, aims, justifications and authority of comparative law,[1] but they do so in a more practical and contextualized fashion.

The contextualized nature is not always and not necessarily reflected in an analysis or account of the different contexts. It rather becomes evident in the structure of the book and the selection of contributors. We have asked contributors with different backgrounds – academically, geographically, culturally, but also in the way they are "doing" comparative law at their institutions and therefore with respect to the purpose of the comparative exercise (e.g. theoretical or practical)[2] – to reflect on the same questions. The contributions are published in pairs in the same part of the book to facilitate comparison and the latter is enhanced by comments when available. In this way, the specificities, but also possible similarities become evident. By encouraging comparison of the different ways in which comparative law is "done", this book therefore contributes to a reflection on the methods of comparative law.

The turn to methodological questions in comparative law theory may be interpreted as a sign of the "coming of age" of comparative law[3]. Examples of the recent interest for those issues are the turn to (or away) from social sciences (e.g. in comparative constitutional law[4]) or the historiographic debate (e.g. in comparative law at large[5]). At the same time, one may observe a growing interest for the notion and/or politics of "comparison" across comparative disciplines/practices in social and human sciences. This includes law, of course, but also literature, history, politics, anthropology or theology.[6].

1 See e.g. SAMUEL, An Introduction to Comparative Law Theory and Method; HUSA, A New Introduction to Comparative Law; Monateri (ed.), Methods of Comparative Law; Bussani & Mattei (eds), The Cambridge Companion to Comparative Law; Nelken & Örücü (eds.), Comparative Law: A Handbook; Reimann & Zimmermann (eds.), Oxford Handbook of Comparative Law; Van Hoecke (ed.), Epistemology and Methodology of Comparative Law; Harding & Örücü (eds.), Comparative Law in the 21st Century.

2 See BASEDOW, Comparative Law and its Clients, particularly p. 833 *seq* & p. 839 *seq.*

3 See on the dearth of writings on comparative law methods: SAMUEL, An Introduction to Comparative Law Theory and Method, p. 3 *seq*.

4 See the discussion in GARDBAUM, in this volume.

5 See the discussion in WIJFFELS, in this volume.

6 See the discussion in MCCRUDDEN, in this volume. See also the recent Sawyer seminar series "The History of Cross Cultural Comparatism," organised by the Cambridge

2. This volume is organized in four sections, followed by a conclusion that ties in our comparative law theory discussions to further debates on globalization. The contributions in the first three sections address the three questions the book raises: What is and should be compared when comparing *law*? (Part I); What does and should *comparing* (law) mean? (Part II); *How* does and should one compare law? (Part III). During the conference at the origin of this publication, each chapter was commented by a panel of two to three commentators. Not all comments could be published in this volume, but some are under Part III. The fourth section includes contributions based on the impulse papers presented at the roundtable entitled *Comparing the Un-Comparable in Law – A Curse?* (Part IV).

3. The first part of the volume brings together two different accounts of the object of comparison in comparative law. They reflect the various ways of answering the question "what to compare when comparing law".

William Ewald takes stock of his earlier position on the issue[7] and reflects on how comparative law (mainly in the US) has changed in the last twenty years. One of his main arguments is that one should include conceptual and theoretical discussions when comparing law, and not to limit comparison to rules (law in the books) nor to context, though those other two aspects are also important. He observes, in addition, that this concern remains essential, even if the field of comparative law has changed considerably in the last twenty years, with one positive change being the development of comparative constitutional law that moves the object of comparison beyond the traditional private law focus. However, according to Ewald, other changes such as the use of (statistical) methods that are taken from other disciplines such as political science narrow down the object of comparison and exclude context and concepts from the scope of comparison. Finally, after expressing some other, more general concerns relating to the state of comparative law, William Ewald broaches the question of how internationalization affects the concept of law and hence the abstract object of comparison.

Yuzuru Shimada follows an entirely different approach in his contribution, though the main thrust of his chapter takes up William Ewald's argument that one should compare rules, context AND theory / conceptual discussion. With an Asian perspective and a practical approach to legal reform, Yuzuru Shimada's analysis of constitutional transplants in Indonesia and Japan includes the role of foreign legal thought, legal theory and the law making elites. Using several examples, he shows

Centre for Research in the Arts, Social Sciences and Humanities, available at: <http://www.crassh.cam.ac.uk/programmes/the-history-of-cross-cultural-comparatism>, and the project "Practices of Comparison" at the Centre for Interdisciplinary Research at the University of Bielefeld, available at: <http://www.uni-bielefeld.de/(en)/ZIF/KG/2013Vergleich/index.htm>.

7 EWALD, Comparative Jurisprudence (I); EWALD, Comparative Jurisprudence (II); EWALD, The Jurisprudential Approach.

how the theories and intent behind the texts changed depending on the circumstances in Japan and Indonesia. He thereby illustrates what insights can be gained from using a relatively large "object of comparison", and contributes to the discussion on legal transplants.[8]

4. The second part of the volume pertains to the meanings of comparison and the nature and aims of comparative law. It follows a similar pattern to the first. It combines a more academic and theoretical account with more practical one drawing from the experience of "doing" comparative law. The differences in approach between the two chapters are even more apparent in the second part than in the first one.

In the first contribution, Christopher McCrudden presents an inspiring reflection on the aims and methods of comparison. He does so in a theoretical way, going back to basics and beyond the field of law. His thought-provoking analysis reveals the basic elements and assumptions present in each and every comparative enterprise. He concludes with "a series of foundational questions", including interrogations "about the nature of similarity and dissimilarity" and "about how far the problem of comparison is more about what is being compared than about the method itself." This shows, according to McCrudden, that further work is necessary in order to grasp the serious problem surrounding "comparison".

Peter Roudik's contribution is not concerned with the theoretical considerations underlying comparison. He shows that – irrespective of conceptual and theoretical complexities – comparative law is "just done". The author describes the different activities at his institution – the Global Legal Research Center of the Law Library of Congress, which provides information on foreign law upon request, typically by the US Congress, but also by courts and the executive branch of the US government. The aim of comparison is therefore very practical. When asked to present concepts "equivalent" to concepts in the legal order of the client, the comparative element manifests itself, he argues, mainly in the perspective of the client's legal system and its conceptual setting. In horizontal comparisons of several jurisdictions, the comparison at the Global Legal Research Center involves identifying legal norms that fulfil similar functions in foreign systems, situating them within the respective legal system and its more general context, and then elaborating on similarities and differences, possibly supplemented by case studies and statistical indications. This account shows that answering requests for information on foreign legal system with a view of law-making seems particularly prone to functional and conceptual comparisons.

[8] See WATSON, Legal Transplants; TEUBNER, Good Faith; for a historical overview: CAIRNS, Watson, Walton, and the History of Legal Transplants; for a recent point of view: HUSA, A New Introduction, p. 105.

In their contribution, Thalia Khabrieva and Yuriy Tikhomirov present a second practical approach to the nature and aims of comparison, though their account is different from Peter Roudik's. According to them, comparative legal studies in Russia are "emerging as one of the best available resources for addressing practical legal problems". The authors point out that the purpose of comparison can be different, depending on what is being compared (cultural context to revise "previous conclusions and assessments of (…) the evolution of a given legal system and of its present effectiveness" or legal institutions in order to give a statement on the necessity of "implanting a new legal institution into an existing national legal system"). While the activities of the Institute of Legislation and Comparative Law under the Government of the Russian Federation include developing general accounts of foreign law, legislative techniques and enforcement practices as well as analyses in the context of legislative drafting, the current focus of attention is comparison for the purpose of integration processes. In this context, according to the authors, the main challenge is to overcome legal divergences, and the authors mention a range of tools developed in order to do so.

5. The third part deals with the methods of comparative law. Again, it combines a more academic and a more practical approach to the question. In addition, two commentators add their perspectives on the contributions and the questions they raise.

In the first contribution, Stephan Gardbaum describes the methods used in comparative constitutional law. In his account, the range of different methods within the discipline corresponds to the multitude of different types of people who "do" comparative constitutional law and their different purposes. While the author observes "key scholarly divide (…) between constitutional law (…) and constitutional politics", other factors such as the common law / civil law divide or an orientation towards legal pluralism or cosmopolitanism also impact the methods in this area of constitutional law. Gardbaum argues that comparative constitutional law should not give up this diversity and become a sub discipline of social sciences, but keep up and cultivate a methodological diversity without encouraging strong compartmentalization, though with an increased awareness on the aim, object and methods. He concludes that comparative constitutional law has developed into a relatively independent field "with its own paradigms, debates, distinctions and camps, which are not really applications (…) of the broader field." This particularity is due according to Gardbaum, to the influence therein of a separate social science sub-field (political sciences), the close interrelation between theory and practice, and the necessity of the field to go beyond law and courts.

In the second contribution, Timothée Paris does not address the method of the entire discipline or of a sub-field of comparative law. He looks at comparative law "in practice" in the context of a single institution, the French *Conseil d'Etat*. For a long time, its institutional practice did not allow for references to foreign law, as

this was perceived as contradicting the uniqueness of the institution and French administrative law. During the last fifteen years, however, a "culture of comparative law" has developed within the institution. This culture shows itself in various ways in which comparative law is "done": through institutional exchange on substantial issues (rather than limited to representative contacts), through a specialized unit comprising three comparative lawyers trained abroad (US/UK; Germany; Italy/Spain) that drafts reports if a judge so requires, and through a type of research cooperation established within a panel of the Society of Comparative Law. In the end it is the judge that carries out the comparative analysis and decides how and to what extent comparative insights have a bearing on the decision. The willingness of the Conseil d'Etat to engage in such an endeavour is, according to Paris, a sign of a changing identity of that institution.

Two commentators engage with those chapters' reflections on how to do comparative law. Roberto Fragale Filho, pointing out the differences between the contributions, alludes to the difficulties of comparing very different issues. After commenting each contribution individually, his comparison of the two stresses the importance of boundaries for the comparative exercise in general. According to Fragale Filho, different types of doing comparative law – in court, but also in academia - represent different ways of negotiating boundaries. Salvatore Mancuso addresses the argument of each paper individually. Commenting on Gardbaum's contribution, he takes quite a different stand regarding the relationship between comparative constitutional law and comparative law. He also points out differences in the notion(s) of legal pluralism used in the respective fields. With reference to Paris, Mancuso reflects on different uses of comparative law in the judiciary (legitimizing a solution or finding it), as well as on the new perception of comparative law by the French judiciary. Altogether, this part on the method of comparative law, rather than taking up the usual discussions in general comparative writing, and in spite of its heterogeneity, accepts the plurality of methods, although it is clear that the debate does not end, but rather starts there.

6. The fourth section of the volume consists in four – again very different – contributions that reflect on the question "Comparing the uncomparable in law– a curse?". Interestingly, to a greater extent than in the previous parts, one main topic emerges in all four contributions, though to quite different extents: the individuality or subjectivity of the comparative exercise, and, consequently, the co-existence of multiple approaches to "comparing law".

Many contributors point out to the existence of two main currents: the universalistic (or positivistic) approach and the contextual approach. According to Constance Grewe, the first approach has strict criteria for assessing comparability and therefore limits comparison to very specific "laws", while the second one regards different laws as un-comparable in principle. More important than this dichotomy, according to Grewe, is the multiplicity of comparisons and methods. While she

welcomes this diversity, she sees disclosure of aims and scope of any comparative research as a necessary element to achieve comparability.

Franz Werro's chapter deals with the diversity of comparisons as well. As law is not an objective and abstract system, according to him, comparison cannot be considered as objective either, but rather as an individual and cultural undertaking. His structured analysis of the different ways to compare traces back the different approaches to the cultural backgrounds of the comparatists and their conceptions of law. Werro schematically distinguishes the universalistic (civil law) approach (law as science) from the common law approach, which is more open to disclosing individual choices. While in his view, comparatists should above all aim at discovering and exploring factors that make law as it is, and therefore should go beyond legal sources, he also points out that there is no "true" way of engaging in comparative studies.

Bin Li is very aware of the cultural dimension of comparing when he describes the way comparative law is "done" in the People's Republic of China. According to him, as a surviving heritage of the early 20th century (in spite of the big political changes), comparative and foreign law is mainly treated there in order to facilitate the transplantation of legislation. Therefore, the discussion on un-comparability mainly pertains to transplantability, and the universal / general approach seems to be more generally shared (assuming the general comparability) amongst lawyers. The necessity of context is mainly discussed in the perspective of the local context (i.e. the receiving system).

Alain Wijffels relates to comparative law not by reference to his geographical background, but to his academic discipline, i.e. legal history. His contribution deals with legal comparisons in history as well as with historical analyses by comparative lawyers. More generally, Wijffels establishes how comparative law and legal history are intertwined, both of them being exposed to similar, more general trends and therefore developing along similar lines. In both disciplines, he argues, there have been universalist/dogmatic and context-oriented tendencies, the latter being aware of the law's links to society. In his view, there is a need today to open up to social sciences, and this should be to the benefit of the credibility of the discipline.

7. In his concluding remarks, Alain Supiot develops a critique of the risks of applying economics or rather one of their methods, i.e. quantification, to comparative law and law more generally. According to him, quantification has been going "hand in hand with the project of uniform and universal law". A quantified conception of comparative law (as it is to be found increasingly in the media, political and economic discourse) does not take into account the context, culture and history of law. Supiot points out the dangers of what he calls fundamentalist tendencies related to the reference to a single universal norm. He concludes by calling for

"mondialisation" that respects and values the diversity "as vital support for the institution of reason in a world bound to remain diverse and unpredictable".

8. The various accounts in this volume show that there is more than one way of doing comparative law. As indicated, the structure of the book and the ordering of the contributions aimed at presenting, contrasting and comparing different approaches to key questions in comparative law theory. We are very well aware that a different structure and ordering could also have been chosen. The chapters relate to one another in several other aspects and across the three sections of the book. Sometimes the geographical background of authors reflects a common concern or experience, as when both "Asian" contributors talk about transplant or when the continental civil lawyers call for taking into account context and other disciplines. At other times, it is the professional background of authors that is echoed in the contributions, as when the authors from a comparative law institution reflect specifically on their institution (as they were asked to) while academics are more prone to general reflections. Those differences confirm, as many authors have pointed out throughout the volume, that there is more than one way to do comparative law. In order for comparative law to gain intellectual vigour and persuasive force, we are convinced that transparency and debate on those issues are essential. As Christopher McCrudden puts it, "getting to grips with the problem of comparing comparisons would benefit from considerably more thought and engaged debate." This book is a first attempt to contribute to that conversation.

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